



# Synopsis

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Through analysis of and comment on new laws and judicial decisions of interest, Synopsis helps executives to identify developments and trends in tax law and revenue practice that may affect their business.

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## Updated OECD Commentary on cross-border working from home or other relevant places

On 18 November 2025, the OECD Council approved updates to the Commentary on the Model Tax Convention, including new guidance on Article 5 and the creation of permanent establishments when working from home or other relevant places. The new Commentary reflects a departure from the existing considerations in the determination of whether a permanent establishment exists.

### Introduction

The increasing prevalence of ‘digital nomad’ activities in recent years has resulted in a growing number of individuals working in countries other than those in which their employers or businesses are tax resident. This trend has given rise to important questions concerning the concept of a permanent establishment (‘PE’). A PE is a fundamental concept in international tax law, as it is critical in determining whether the business profits of taxpayers should be subject to tax in countries in which they are not resident as a result of their physical presence in such countries. The concept of a PE therefore effectively serves as the threshold for the allocation of taxing rights on non-residents.

Article 5 of the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital (as amended) (‘the OECD MTC’) contains a

definition of a PE. The OECD MTC is also accompanied by commentary ('the Commentary') which sets out guidance on each of the articles of the OECD MTC. The latest edition of the OECD MTC was issued in 2017, together with accompanying commentary ('the 2017 Commentary').

A PE can arise in various circumstances, including when a foreign enterprise carries on its business in a jurisdiction through a fixed place of business ('FPoB'). The 2017 Commentary confirmed that the central test to determine whether a FPoB PE exists for an enterprise is whether that place of business is 'at the disposal' of that enterprise. The OECD also provided specific guidance during the COVID-19 pandemic as a result of the lockdowns implemented by countries throughout the world resulting in more people working from home.

The new guidance issued in 2025 ('the 2025 Updated Commentary') has departed from the 'at the disposal' test with regard to working from a 'home office or other relevant place' (which includes a second home, a holiday rental, and the home of a friend or relative) by establishing a different analytical framework through which the existence of an FPoB PE needs to be considered.

This article sets out the relevance of PEs and the applicable definitions in the South African ('SA') domestic context, before turning to existing and updated OECD guidance on whether home offices and other relevant places can give rise to PEs. Thereafter, we offer observations on the 2025 Updated Commentary and conclude with key considerations for taxpayers.

## What is the relevance of PEs?

A PE is a fundamental concept in international tax law that is central in determining when a country has the right to tax the business profits of a non-resident enterprise. It serves as the threshold for establishing a taxable presence in a jurisdiction outside of residence.

A non-resident company will create a domestic SA taxable presence and, accordingly, be subject to SA CIT at 27% if both of the following requirements are met:

- the non-resident derives income from an SA 'source'; and
- the SA source income is 'attributable' to a PE in SA per the definition in the relevant double tax agreement ('DTA'), if applicable.

Accordingly, where the above non-resident is resident in a jurisdiction that has a DTA with SA, its liability for SA tax on any SA 'source' income will depend on whether or not it has a PE in SA through which it carries on business.

## DTAs

DTAs are bilateral agreements entered into by countries to prevent the same income from being taxed twice – once in the 'source country' and again in the 'country of residence'. DTAs are given effect to for South African corporate tax purposes through section 108 of the Income Tax Act No.58 of 1962 ('the Act').

SA has an extensive network of DTAs. SA DTAs are largely based on the OECD MTC. Although SA is not a

full member of the OECD, it holds an observer status. The United Nations Model Double Taxation Convention between Developed and Developing Countries ('the UN MTC') is an additional model tax convention which generally differs from the OECD MTC in that it generally seeks to allocate taxing rights to source jurisdictions and is generally followed by developing countries. DTAs may contain elements of both the OECD MTC and the UN MTC (as briefly outlined further below).



## MTCs

The OECD MTC is a model framework developed by the OECD that provides a standardised template for the negotiation, interpretation, and application of bilateral tax treaties between countries. The OECD MTC requires constant review to address new tax issues that arise in connection with the evolution of the global economy. The OECD MTC is periodically updated, with the most recent full version reflecting the text as it read on 21 November 2017. The OECD MTC is supplemented by the OECD's MTC Commentary, which is also periodically updated and which provides guidance on the interpretation and application of each article.



## Role of the OECD's MTC Commentary in the interpretation of DTAs

SA courts have not always followed a predictable and consistent approach to the interpretation of DTAs. However, the Supreme Court of Appeal decision in 2015 in the case of *Krok and another v Commissioner for the South African Revenue Services*<sup>1</sup> ('the *Krok* case') confirmed that Articles 31 and 32 of the Vienna Convention on the Law of Treaties are binding on SA and must be taken into account when interpreting a DTA. Under the Vienna Convention, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 'Context' comprises, in addition to the text, any agreement or instrument relating to the conclusion of that treaty and accepted by the other parties as such.

The difficulty in applying the Vienna Convention in relying on the OECD MTC Commentary for any particular DTA is that the OECD MTC Commentary does not fit comfortably within any of these categories. While SA holds observer status, it is not a member of the OECD, and the OECD MTC Commentary should not be elevated to the level of either international law or customary international law. Indeed, even the OECD does not regard its MTC Commentary as binding, since it suggests that although the Commentary is "of great assistance in the application and interpretation of the conventions", it is not binding, as only the conventions signed by countries are. From time to time, SA courts have nevertheless referred to or relied on the OECD's MTC Commentary, although regrettably in

<sup>1</sup> [2015] ZASCA 107.

these instances they have not set out the basis on which they did so.

The question then arises as to which version of the OECD's MTC Commentary is the most appropriate point of reference in any given case. In the 1995 Canadian Supreme Court decision in *Crown Forest Industries*<sup>2</sup>, the court held that the Commentary that existed at the time when a specific treaty was concluded constituted extrinsic materials which formed part of the 'legal context' of that treaty per the Vienna Convention and should hence play a significant role in its interpretation.

'Legal context' was described as the body of substantive law that may be looked at to infer legislative intent, including relevant case law, statutes, common law and international law. This suggests that where a particular treaty is based on a certain version of the OECD MTC, the prevailing Commentary at that time should carry persuasive value in interpreting the treaty. By the same token, where subsequent versions of the OECD MTC underwent drastic departures from an earlier one, it may not be appropriate to interpret the pre-existing treaty with reference to the subsequently amended Commentary. The weight of later, more comprehensive versions of the Commentary in respect of the OECD MTC that remained unchanged (as in the current instance) is less clear, although arguably these also carry persuasive value. Subsequent versions of the OECD's MTC Commentary may, however, shed light on wording that is similar to that contained in the treaty under consideration, and in such cases, they too may carry persuasive weight.

<sup>2</sup> *Crown Forest Industries Ltd. v Canada*, [1995] 2 SCR 802.

## PE definition

Two definitions of a PE are relevant from an SA perspective:

- The SA domestic law definition in terms of section 1 of the Act is relevant in determining: (i) whether a non-resident is required to register for SA corporate income tax purposes and submit an income tax return, and (ii) whether a non-resident has earned income from an SA source through the disposal of assets effectively connected to a PE in SA; and
- The definition of a PE per an applicable DTA is relevant in determining whether SA is allocated taxing rights, i.e., whether a non-resident that is resident in a jurisdiction with a DTA with SA is subject to corporate income tax in SA, as determined by the definition of a PE contained in the relevant DTA.

These are dealt with below respectively.

### Domestic law PE definition

The domestic law PE definition defines a PE with reference to Article 5 of the OECD MTC, as amended 'from time to time'.

### DTA PE definition

The DTA PE definition depends on the applicable DTA. As discussed above, many of the SA DTAs are largely based on the OECD MTC. We therefore proceed to comment on the OECD MTC PE definition and the related updates to the OECD's MTC Commentary as they relate to FPoB PEs (i.e., we do not consider other possible PEs

for purposes of this article). We have also included an extract from the UN MTC that is relevant for purposes of this article.

### Article 5 of the 2017 OECD MTC regarding PEs

#### Permanent Establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on.

It is worth noting that Article 5 also includes other paragraphs which outline specific inclusions in and exclusions from the PE definition, including instances where the activities conducted at the fixed place of business are preparatory or auxiliary in nature.

### Article 5 of the UN MTC

#### Permanent Establishment

2. The term "permanent establishment" also encompasses:

The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.



## Home office PEs in terms of OECD guidance

Below, we set out guidance provided by the OECD relating to home offices. This includes the 2017 Commentary, guidance issued during the COVID-19 pandemic, and the 2025 Updated Commentary.

### 2017 Commentary

The 2017 Commentary previously provided the guidance below with regard to home offices and the possible creation of PEs:

"18. Even though part of the business of an enterprise may be carried on at a location such as an individual's home office, that should

not lead to the automatic conclusion that that location is **at the disposal of that enterprise** simply because that location is used by an individual (e.g. an employee) who works for the enterprise. Whether or not a home office constitutes a location at the disposal of the enterprise will **depend on the facts and circumstances of each case**. In many cases, the carrying on of business activities at the home of an individual (e.g. an employee) will be so **intermittent or incidental** that the home will not be considered to be a location at the disposal of the enterprise (see paragraph 12 above). Where, however, a home office is used on a **continuous basis for carrying on business activities** for an enterprise and it is clear from the facts and circumstances that **the enterprise has required the individual to use that location to carry on the enterprise's business** (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise.

19. A clear example is that of a non-resident consultant who is present for an **extended period** in a given State where she carries on **most of the business activities of her own consulting enterprise from an office set up in her home in that State**; in that case, that home office constitutes a location at the disposal of the enterprise. Where, however, a cross-frontier worker performs most of his work from his home situated in one State rather than from the office made available to him in the other State, one should not consider that the home is at the disposal of the enterprise because the enterprise did not require that the home be used for its business activities. It should be noted, however, that since the vast majority of employees reside in a State where their employer has at its disposal one or more places of business to which these employees report, the question of whether or not a home office constitutes a location at the disposal of an enterprise will rarely be a practical issue. Also, the activities carried on at a home office will often be merely auxiliary and will therefore fall within the exception of paragraph 4.” **(own emphasis)**

From the above, it is clear that the threshold for the establishment of a PE in respect of a home office in terms of the 2017 Commentary depended on whether the home office could be described as being under the control of the enterprise. This would depend on the specific facts and circumstances of each case, with specific regard

being had to whether the activities of the individual were intermittent or incidental, or whether the home office was used on a continuous basis and the use thereof was required by the enterprise. The example provided in the 2017 Commentary (i.e., where most of the business activities take place in the home office where the non-resident is present for an extended period) suggests that there is a threshold relating to the amount of time spent and work done at the home office relative to other places which could indicate that the home office is at the disposal of the enterprise.

It is worth noting that from an SA jurisprudential perspective, the ‘at the disposal’ test has been applied to determine whether an FPoB PE arises. Specifically, although not strictly with reference to the ‘at the disposal’ test, the Appellate Division (in the case of *SIR v Downing*<sup>3</sup>) previously considered factors such as occupation and control as being relevant in determining whether an FPoB has been established. The ‘at the disposal test’ was also applied by the Tax Court in the case of *AB LLC and another v Commissioner of the South African Revenue Services*<sup>4</sup>, which concluded that as the foreign consultant had a sufficient degree of occupation and control of a boardroom of their client, that workspace constituted an FPoB PE for that consultant.

### OECD guidance during COVID-19

As a result of the COVID-19 pandemic, many individuals were required to work from home. This resulted in the OECD publishing a policy response to the COVID-19 pandemic (on 3 April 2020), and then providing

subsequent guidance (on 21 January 2021). The OECD noted that widespread government lockdowns and travel restrictions forced individuals to work from home as a matter of *force majeure* rather than individual choice. As a result, the OECD indicated that working from a home office during the COVID19 pandemic would generally not create a PE for the employer, because such arrangements lacked the necessary permanence and the enterprise typically had no access to or control over the home office. The OECD framed this as a response to the exceptional nature of the pandemic and related public health measures and indicated that such guidance only applied while COVID19 public health measures were in effect.

### 2025 Updated Commentary

As indicated, this article focuses on the updates to the OECD’s MTC Commentary (i.e., in the 2025 Updated Commentary) as it relates to persons working from home or other relevant places creating PEs. Although the 2025 Updated Commentary contains various other updates as well, we do not address them here.

The 2025 Updated Commentary introduces paragraphs 44.1 to 44.21 to Article 5 to address cross-border working from home or in other relevant places. These paragraphs recognise that individuals are increasingly choosing to carry out all or part of their work for an enterprise of one contracting state from a location in another contracting state. These activities could be conducted in places such as a home, a second home, a holiday rental, or the home of a friend or relative (i.e., places that are not the premises of the enterprise itself or of a customer, supplier, or associated enterprise). The guidance sets

<sup>3</sup> 1975 (4) SA 518.

<sup>4</sup> [2015] ZATC 2.

out an analytical framework for determining whether such arrangements give rise to a PE under paragraph 1 of Article 5. It acknowledges that these places present particular features which distinguish them from the use of other business premises, including limited access by other personnel and a greater degree of personal control by the individual.

As for determining the threshold, the 2025 Updated Commentary reaffirms that it must be grounded in the facts and circumstances of the relevant period, and that any home or other relevant place must satisfy the requirements of permanency in accordance with the pre-existing paragraphs 28 to 34 of the OECD's MTC Commentary. The 2025 Updated Commentary acknowledges that, in many cases, the use of a home office or other relevant place may be intermittent or incidental in nature and that it would not be considered to be a place of business of the enterprise in such a case.

The position remains that, even where an FPoB PE might otherwise exist, the activities carried on must not fall within the exclusion for preparatory or auxiliary activities under paragraph 4 of Article 5. Critically, the mere fact that an individual uses a place to carry out activities related to the business of an enterprise does not, of itself, lead to the conclusion that the place constitutes an FPoB PE.

Central to the new guidance is a quantitative threshold: where an individual works for the enterprise from a home or other relevant place for less than 50 per cent of their total working time over the course of any twelve-month period commencing or ending in the fiscal year concerned, the place would generally not be considered to be a

place of business of the enterprise. The actual conduct of the individual (as opposed to any formal contractual arrangements alone) determines the calculation of working time, noting that the relevant contractual terms may serve as practical evidence to the extent that they correspond with the individual's actual behaviour. Where the 50 per cent threshold is met or exceeded, the analysis shifts to a broader inquiry where the prominent consideration is whether there is a 'commercial reason' for the individual's activities to be undertaken in the contracting state where the home or other relevant place is situated.

The 2025 Updated Commentary devotes considerable attention to the concept of a 'commercial reason'. A commercial reason is considered to exist where the physical presence of the individual in the relevant state itself facilitates the carrying on of the enterprise's business. This could arise where there are people or resources in that state to which the enterprise needs access. Examples include direct engagement with customers, suppliers, or associated enterprises, the provision of services requiring physical presence, real-time interaction with customers or suppliers in different time zones, and access to expertise.

Notably, the guidance makes it clear that a commercial reason requires a link between the individual's presence at the home or other relevant place and the carrying on of the enterprise's business. Enabling an individual to work remotely solely to retain or attract talent, or solely to reduce costs such as office expenditure, will not satisfy this requirement. Equally, the mere presence of customers, suppliers, or associated enterprises in the state or the fact that the state is in a different time zone is not

sufficient to establish a commercial reason automatically. Where no commercial reason exists, the home or other relevant place would generally not be regarded as a place of business of the enterprise, unless other facts and circumstances indicate otherwise.

The 2025 Updated Commentary further includes five examples which outline whether a certain remote working arrangement could result in an FPoB PE being established. We quote these examples below and thereafter provide a summary of whether the guidance indicates that a PE is established or not and the reasoning for that outcome.



### Example A:

“An employee of RCo, an enterprise of State R, works from State R as part of her regular working pattern. During a twelve-month period, she rents and works from a place in State S for a period of three consecutive months following a holiday stay in State S.”

#### Outcome:

No PE is created, as the fixed place of business lacks permanence. The 2025 Updated Commentary further provides that in determining whether a PE arises where the place is used on a recurrent basis over several years, the number of times which that place is used over the years should be considered.

### Example B:

“An employee of RCo, an enterprise of State R, works from her home in State S for one or two days per week throughout a twelve-month period, which totals 30 per cent of her working time during that twelve-month period.”

#### Outcome:

Although there is a sufficient degree of permanence, no PE arises on the basis that the individual spends less than 50% of her working time working from home.

### Example C:

“An employee of RCo, an enterprise of State R, works from his home in State S for 80 per cent of his working time in any twelve-month period. He regularly visits clients of RCo in State S in order to provide services to those clients.”

#### Outcome:

A PE arises on the basis that there is a sufficient degree of permanence, the individual spends more than 50% of his working time from home, and there is a commercial reason for the individual's presence in State S.

### Example D:

“An employee of RCo, an enterprise of State R, works from his home in State S for 60 per cent of his working time in a twelve-month period. He has an exclusively client-facing role and provides services to clients of RCo in State R, in State S, and in a third state. He provides those services remotely and does so without physically meeting those clients. Once a quarter, he visits the premises of a client in State S to spend a day reviewing performance against the terms of the contract with RCo.”

#### Outcome:

Although there is a sufficient degree of permanence and the employee spends more than 50% of his time working from home, it does not appear that there is a commercial reason for him to carry out his activities in State S. Therefore, no PE arises.

### Example E:

“An employee of RCo, an enterprise of State R, works almost exclusively from her home located in State S. The employee provides services virtually to customers in State R and/or in other jurisdictions located in time zones which differ from that in State S. The performance of those activities in State S enables the employee to be fully available (e.g., offering real-time or near real-time services around the clock) to customers of RCo in the time zones where those customers are located.”

#### Outcome:

A PE arises on the basis that there is a sufficient degree of permanence, the individual spends more than 50% of her working time working from home, and there is a commercial reason for the individual's presence in State S.

## Observations on the Updated OECD MTC's Updated Commentary

A notable feature of the 2025 Updated Commentary is that the 'at the disposal' test, which was previously established under the 2017 Commentary and applied with approval by SA courts, has been effectively removed from the new guidance relating to home offices without express reason or engagement. Given that the wording of Article 5 of the OECD MTC itself remains unchanged and that the Commentary is not legally binding but merely persuasive, it could be argued that the 'at the disposal' test continues to apply in these instances in the SA context, notwithstanding its omission from the 2025 Updated Commentary.

In this context, it is unclear to what extent the new 50 per cent threshold test and the commercial reason test can properly be read into the actual wording of Article 5(1), which requires only that there be a 'fixed place of business through which the business of an enterprise is wholly or partly carried on'. The additional tests postulated by the 2025 Updated Commentary, while potentially useful as practical indicators, do not appear to derive directly from the language of Article 5 itself, and their application may therefore be open to challenge.

It is noted that a PE could separately arise in terms of the services PE (as contemplated in the UN MTC) article and/or the dependent agent PE article. We do not consider these further here.

## Key conclusions

Given the significant change in commercial practice concerning individuals working remotely from non-business premises, taxpayers should carefully assess whether the risk of a PE arises in light of both existing and new guidance which has been issued. This could impact non-SA resident companies where their employees work within SA for a period of time, potentially giving rise to SA tax registration and payment obligations. Equally, SA resident companies whose employees work from relevant places outside of SA could face foreign tax implications. These matters need to be assessed on a case-by-case basis.

The potential application of the 'at the disposal' test should still be considered, given that it has been applied by SA courts and the wording of Article 5 of the OECD MTC remains unchanged.

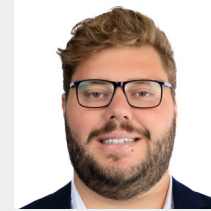
Taxpayers should also bear in mind the importance of considering the wording of an applicable DTA when assessing whether a PE arises. This could include the 'services PE' as contained in the UN MTC, which may establish PEs in instances where individuals work from home in excess of 183 days in any 12-month period commencing or ending in the fiscal year concerned.

Finally, once a PE has been established, it needs to be determined how the income of the enterprise will be attributed to that PE. This can be a complex exercise.

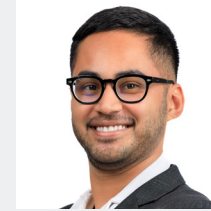
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## The High Court has declared section 7(4) of the VAT Act inconsistent with the Constitution and therefore invalid. This order was referred to the Constitutional Court for confirmation

### In brief

The recent High Court case *Democratic Alliance v Minister of Finance and Others*<sup>1</sup> ('DA case') has emerged as a landmark case addressing the constitutional boundaries of taxing powers in South Africa ('SA').

The central issue in this case was whether the power of the Minister of Finance ('the Minister') to unilaterally adjust the value-added tax ('VAT') rate under section 7(4) of the VAT Act<sup>2</sup> complies with constitutional principles, particularly the separation of powers and Parliament's exclusive authority to impose taxes.

<sup>1</sup> 2025/045530/2026 ZAWCHC 102.

<sup>2</sup> Value-Added Tax Act, 89 of 1991. All references to section 7(4) hereinafter are to section 7(4) of the VAT Act.

### Background

This case results from a highly contentious episode in South Africa's fiscal landscape during 2025 where the Minister proposed to increase the VAT rate through an announcement during the presentation of the national annual budget.

On 12 March 2025, the Minister, relying on section 7(4), announced an increase in the VAT rate from 15% to 15.5%, effective from 1 May 2025, with a further increase to 16% effective from 1 April 2026.<sup>3</sup>

This was not an unknown process at the time, as the VAT rate had been increased once before (in 2018) under the provisions of section 7(4), without any resistance.

<sup>3</sup> <https://www.treasury.gov.za/documents/National%20Budget/2025Mar/review/Chapter%204.pdf>.

The history of section 7(4) is insightful. The provision was only introduced in 2016 in response to concerns that were raised that the power afforded to the Minister to set income tax rates was, in its then form, unconstitutional, for the same reasons that the High Court reasoned in this case. As a result, amendments were made to the equivalent power afforded to the Minister for purposes of income tax, and similar provisions were introduced for all other taxes, including VAT. Interestingly, at the time, the twelve-month rule (explained later) was seen as a reasonable compromise that would likely leave sufficient oversight with Parliament, such that it did not amount to an unconstitutional delegation of its taxing powers, on the understanding that if Parliament did not approve the tax change it would have to be reversed with retrospective effect. Unfortunately, the practicalities of this were not fully considered in the context of a tax such as VAT.

Last year, the VAT increase announcement received extensive public and political opposition, resulting in the Minister subsequently withdrawing the proposed rate increase on 21 May 2025.<sup>4</sup>

The enactment of the 2025 Rates and Monetary Amounts and Revenue Laws Bill,<sup>5</sup> which included a clause confirming that the 12 March 2025 announcement “does not come into effect”, effectively resulted in the VAT rate remaining at 15%.

<sup>4</sup> <https://www.treasury.gov.za/documents/National%20Budget/2025May/speech/speech.pdf>.

<sup>5</sup> [https://www.gov.za/sites/default/files/gcis\\_document/202504/b14-2025-ratesmonetaryamounts.pdf](https://www.gov.za/sites/default/files/gcis_document/202504/b14-2025-ratesmonetaryamounts.pdf).

Navigating a VAT rate increase is generally complex, requiring substantial planning and resources and short implementation timelines. All of which this adds to the complexity of the attempted rate increase in 2025.

The Minister’s announcement and the subsequent Bill caused considerable uncertainty, resulting in vendors being unsure whether to implement and apply the increased rate or not. They found themselves having to navigate the practicalities without much initial guidance, until SARS published some guidelines on how to deal with the situation. This, after costly system updates and preparations had already been set in motion as part of readiness campaigns.<sup>6</sup>

Altogether, the political deadlock in terms of the appropriateness of a rate increase at the time caused a major disruption to business and created much consumer uncertainty.

<sup>6</sup> <https://www.sars.gov.za/media-release/practical-implication-on-finance-ministers-decision-to-reverse-vat/>.



## Case overview

Section 7(4) empowers the Minister to alter the VAT rate through an announcement in the National Budget. Such alteration takes effect from a date specified by the Minister in the announcement (in this case, the announcement was made on 12 March 2025, with an effective date for the first increase of 1 May 2025).

The increased rate then remains effective for up to twelve months, subject to Parliament passing legislation within this time period to give effect to this increased rate.

This provision, therefore, essentially grants the Executive (the Minister) the power to alter the VAT rate with immediate effect through a budgetary announcement, with Parliament’s approval arriving *ex post facto* within a statutory window of one year.

This has always been the case, but the provision has never been challenged before.

In 2025, however, the Democratic Alliance (‘DA’) challenged the constitutionality of the Minister’s entitlement to set the rate by a budgetary announcement, by bringing an application to the Western Cape High Court.

The critical issue before the High Court was whether this rate increase mechanism in section 7(4) amounted to an impermissible delegation of taxing powers to the Minister.

In summary, the DA’s case centred around the fact that the power to impose, increase, or reduce taxes

is exclusively reserved for Parliament and cannot be delegated to the Executive. The DA submitted that this was an absolute prohibition and that the delegation in terms of section 7(4) was impermissible, regardless of the safeguards or limitations imposed.

The Minister and SARS in essence argued that there was a difference between imposing a new tax and altering the rate of an existing tax and that the latter was regulatory in nature and not prohibited. They furthermore argued that there was no absolute prohibition against the delegation of such powers.

## Judgment and discussion

The question before the High Court was, therefore, whether the ‘prohibition on delegating the power to tax extends to the delegation at issue’<sup>7</sup> (i.e., section 7(4)).

In considering this, the High Court stated that it had to be:

‘Guided by the text and structure of the Constitution, the purpose of the prohibition, and (inevitably in the particular circumstances) the practical consequences of our decision’.<sup>8</sup>

<sup>7</sup> Para 44.

<sup>8</sup> *Id.*



## Does a rate change equate to the imposition of a national tax?

First, the court had to consider whether a rate adjustment constituted the imposition or reduction of a national tax. The court found that in increasing the VAT rate, the Minister changes the quantum of the tax payable by the public and that this equates to the power exercised by Parliament when amending section 7(1) of the VAT Act.<sup>9</sup> In other words, an adjustment to the VAT rate indeed equates to imposing, increasing, or reducing a national tax, which are actions constitutionally reserved for Parliament.

The court further indicated that the temporal limitation of up to twelve months did not detract from the substantive legislative effect of the Minister’s announcement. In effect, the provision permits the executive to alter VAT rates immediately, with Parliament’s role being relegated to a delayed formality, undermining legislative supremacy.

## Can taxing rates be delegated?

Second, in considering the validity of section 7(4), with reference to the *Nu Africa*<sup>10</sup> case where ‘the delegation was found to be permissible because of the regulatory nature of the power and the presence of adequate safeguards’, the High Court stated that the same approach should apply in this matter.<sup>11</sup>

<sup>9</sup> Para 47- 48.

<sup>10</sup> *Nu Africa Duty-Free Shops (Pty) Limited v Minister of Finance and Others* [2022] ZACC 31.

<sup>11</sup> DA Case, par 61.

In the end, the question came down to ‘whether section 7(4), assessed within our constitutional framework and in light of the safeguards identified in *Nu Africa*, preserves legislative supremacy in substance while permitting necessary fiscal responsiveness.’<sup>12</sup> It was found that, based on the facts, it did not.

The reasons for the High Court’s finding included, in short:

- the discretion was unfettered;
- the lack of a statutory cap on the extent of the power to increase the rate;
- the lack of statutory guidance on the exercising of the power;
- the increased tax being operational during the 12-month period; and
- the transactional nature and practical irreversibility of VAT.

The High Court therefore did not find that there was an absolute prohibition against the delegation as envisaged in section 7(4), but held<sup>13</sup> that the design of the delegation fell short of:

‘Sufficiently defined statutory limits or mechanisms of prompt legislative control to ensure that the balance between executive agility and parliamentary supremacy is maintained.’

For the reasons mentioned above, the High Court declared section 7(4) unconstitutional.

The outcome of the court’s decision makes it clear that Parliament may delegate elements of tax ratesetting. It must do so, however, within a framework that includes clear statutory limits and with prompt and meaningful

<sup>12</sup> DA Case, par 90.

<sup>13</sup> Para 88.

parliamentary control, particularly where a broadbased and irreversible tax such as VAT is concerned.

Mindful of practical fiscal implications, the declaration of invalidity was suspended for 24 months, granting Parliament a window to amend the legislation to cure the constitutional defect.

The declaration of invalidity was referred to the Constitutional Court for confirmation.

## Takeaway

This judgment reinforces the supremacy of legislative authority in taxation and calls for clear, constitutionally compliant statutory frameworks that balance expediency with democratic oversight.

The decision signals to the legislature that any delegation of tax rate alterations to the executive must be tightly circumscribed, with prompt and effective parliamentary scrutiny.

It is plausible, if not likely, that the Constitutional Court will confirm the High Court's stance, given the entrenched principle that taxing powers rest with the legislature and the requirement for sufficient safeguards to be in place for any delegation. We wait in anticipation to see what the outcome of this review will be.

There are numerous similar provisions applicable to other taxes. It is likely that the outcome of the DA Case as it relates to the increase of taxes may impact these other taxes as well, and that legislative amendments may be

required to align the operation and effect of any such charging provisions in equivalent taxing statutes, for example the Income Tax Act, 1962. That is not to say that the equivalent provisions for all taxes will be problematic, given their differing contexts and manner in which they are levied. However, most transaction-based taxes or taxes that are economically borne by downstream consumers, such as the general fuel levy, dividends tax, and securities transfer tax, are likely to run into similar difficulties as were experienced with VAT.

Accordingly, legislative revisions are expected, and taxpayers should remain vigilant with regard to potential future amendments.

We look forward to the expected further developments in this space.

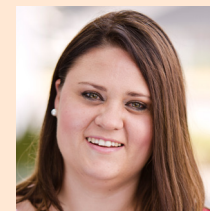
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We gratefully acknowledge the contributions of Kyle Mandy and Adelheid Reyneke to this article.



## Unlocking talent potential through a tax-savvy employee value proposition

### The talent challenge: winning the war for talent

In today's fiercely competitive labour market, attracting, engaging, and retaining top talent requires more than just competitive salaries. A strong employee value proposition ('EVP') has become critical, acting as the heartbeat of your organisation's employer brand. The EVP is not simply a list of perks; it's the totality of rewards, benefits, career development, work-life balance, and flexibility that together shape employees' perceptions of value and loyalty.

Modern employees are increasingly prioritising the holistic value they derive from their employment well beyond the base salary. Organisations that fail to evolve their EVP, risk falling behind in talent acquisition and retention. The real question now is less about whether to invest in your EVP and more about how to maximise that investment

for real impact, particularly by leveraging employment tax strategies that optimise net employee value without escalating costs.

### Why employment tax strategy is a gamechanger in EVP design

What many employers don't realise is that how employee benefits are structured can affect take-home pay – and often, this can be improved without increasing total remuneration costs. South African tax legislation offers specific provisions and exemptions that, when applied proactively and smartly, make certain benefits more tax-efficient for both employers and employees.

For example, flexible compensation plans such as the cost-to-company ('CTC') model allow employees to personalise their remuneration mix. When combined with expert employment tax structuring, these models unlock a

tailor-made EVP that genuinely resonates with employees, enhancing satisfaction and loyalty.

## High-impact areas to enhance your EVP through tax-efficient design

Several key benefit categories offer particularly promising opportunities to boost your EVP via tax-aware structuring:

- **Equity-linked savings mechanisms:** These allow employees to invest a portion of their remuneration on a pre-tax basis, fostering long-term wealth accumulation and providing an attractive savings option aligned with their financial goals.
- **Meal and refreshment benefits:** When correctly administered, certain meal benefits can be provided without triggering taxable fringe benefits, increasing disposable income.
- **Housing and accommodation support:** Structuring housing benefits to comply with tax laws can provide meaningful support to employees, without an unnecessary tax burden.
- **Company-provided communication devices:** Issuing employer-owned devices can offer tax advantages over cash allowances, particularly when they use it mostly for business, reducing taxable benefits for employees.
- **Employee transport solutions:** Employer-arranged transport services for daily commuting may qualify for favourable tax treatment, improving convenience and reducing employees' out-of-pocket costs.

These are just some of the options available to employers to boost their EVP. Each of these areas demands careful consideration of how appropriate they are to the employer and employees' circumstances, their precise alignment

with tax legislation, and their careful implementation. The difference between an effective EVP and one that falls short often hinges on these critical details – where professional expertise is invaluable.

## Building a solid foundation for your EVP

To ensure your EVP delivers real, measurable value and remains fully compliant, focus on these foundational pillars:

- **Transparent policies and agreements:** Clearly documented benefit policies and employee agreements eliminate ambiguity and safeguard clarity regarding entitlements.
- **Accurate payroll and reporting:** The correct application of SARS source codes and compliance with tax reporting prevent costly errors and preserve trust.
- **Employee empowerment through education:** Offering financial wellness programmes or coaching helps employees fully understand, appreciate, and optimise the benefits available to them.

## Takeaway

We encourage every employer to begin by conducting a strategic review of their current benefit offerings through an employment tax lens – identifying untapped opportunities for tax-efficient structuring that genuinely elevate employee value.

By investing in a thoughtfully designed, tax-optimised EVP, your organisation can strengthen its talent proposition, elevate employee satisfaction, and achieve sustainable cost efficiencies.

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We gratefully acknowledge the contributions of Fathima Khan to this article.

Updated OECD Commentary on cross-border working from home or other relevant places

The High Court has declared section 7(4) of the VAT Act inconsistent with the Constitution and therefore invalid

Unlocking talent potential through a tax-savvy employee value proposition

Latest developments



## Latest developments

### Latest developments 26 March 2026 – 25 April 2026

#### PwC thought leadership

Various weekly

PwC thought leadership

[Global Tax Talk](#) — a PwC on-demand video series that quickly and concisely brings you the global tax policy news you need to know in a format that you can access on the go. Every Monday, the Global Tax Policy Leader, Will Morris, provides a 60-second roundup of key perspectives to prepare for the upcoming week. PwC releases news briefings and short interviews with PwC subject matter specialists and global leaders around the world on the issues they see affecting the business community.

30 March 2026

PwC thought leadership

PwC has released a video on Policy on Demand that provides an overview of the *Authority for Advanced Rulings (Income Tax)* and *Others v Tiger Global International II Holdings* case and the implications of the court's decision. The video can be accessed on the [PwC website](#).

30 March 2026

PwC thought leadership

New Tax Order: Following the publication of the New Tax Order ('NTO') executive summary last December, the extended NTO article has been released. This includes in-depth insights from our PwC leaders across all of the megatrends. For more information, please visit the [New Tax Order webpage](#).

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**30 March 2026**

PwC thought leadership

International tax news: This monthly publication offers updates on and analyses of international tax developments around the world, authored by specialists in PwC's global international tax network.

**2 April 2026**

PwC thought leadership

Global Tax Policy Alert: The Global Tax Policy Alert, providing commentary on the WTO's 14th Ministerial Conference, has been made available.

## Legislation

**1 April 2026**

Amendment Acts

Taxation Laws Amendment Act 5 of 2026

- Rates and Monetary Amounts and Amendment of Revenue Laws Act 3 of 2026
- Tax Administration Laws Amendment Act 4 of 2026

**13 April 2026**

Updated online Acts

The following online tax Acts have been updated to reflect Amendment Acts promulgated to date and are now available to download:

- Income Tax Act 58 of 1962
- Employment Tax Incentive Act 26 of 2013
- Carbon Tax Act 15 of 2019
- Global Minimum Tax Administration Act 47 of 2024
- Value-Added Tax Act 89 of 1991

The Acts may be accessed via the SARS website.

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**17 April 2026**

Double taxation agreements &amp; protocols – multilateral instrument (“MLI”)

Although not obligated to do so under the MLI, South Africa has opted for the development of synthesised texts to the MLI. These texts, which are essentially consolidated versions of the covered tax agreements as modified by the MLI, are aimed at facilitating the understanding of the application of the MLI to a particular tax treaty. However, it should be noted that a synthesised text does not constitute a source of law. The authentic legal texts of the tax treaty and the MLI take precedence and remain the legal texts applicable.

A synthesised text represents the following in a single document:

- The text of the covered tax agreement that is modified by the MLI, including the text of amending protocols (where relevant),
- The provisions of the MLI that have an effect on the tax treaty as a result of the interaction of the MLI positions of the jurisdictions, and
- The dates on which the provisions of the MLI take effect for the specific covered tax agreement.

SARS has now published the synthesised texts of the following covered tax agreements:

- Denmark
- Kenya
- Indonesia
- Israel
- Malta
- Portugal

## Interpretation

**27 March 2026**

Interpretation Note 122 (Issue 2)

Interpretation Note 122 (Issue 2) – Public Benefit Activity: Bid to host, or hosting of, any international event under paragraph 11(b) in Part I of the Ninth Schedule to the Income Tax Act, 1962, is available. Issue 1 of IN 122 (dated 18 August 2022) has been archived and effectively replaced by Issue 2.

**30 March 2026**

Draft Interpretation Note – Income Tax Exemption: Bargaining Councils

This Note provides clarity on the approval of registered bargaining councils as institutions, boards, or bodies under section 10(1)(cA)(i). Comments are due by Friday, 8 May 2026.

**31 March 2026**

Interpretation Note 78 (Issue 2)

SARS Interpretation Note 78 (Issue 2) – Allowance for Future Expenditure on Contracts in terms of section 24C of the Income Tax, 1962, is available. Issue 1 of IN 78 (dated 29 July 2014) has been archived and effectively replaced by Issue 2.

## Customs and excise

<b>27 March 2026</b>	Tariff amendments	Publication details for tariff amendments Notices R7301, R7302, R7303, R7304, R7297, R7298, R7299 and R7300, as published in Government Gazette 54412 of 27 March 2026, have been made available.
<b>01 April 2026</b>	Tariff amendments	Publication details for tariff amendments Notices R7340 and R734, as published in Government Gazette 54445 of 1 April 2026, have been made available.
<b>17 April 2026</b>	Tariff amendments	Publication details for tariff amendments Notice R7373, as published in Government Gazette 54519 of 17 April 2026, have been made available.
<b>20 April 2026</b>	Draft amendments to rules under section 120 – Surety bonds	Rule 120.08 has been substituted to specify that security in the form of a surety bond can now be furnished in either paper or digital format. In addition, a definition for 'digital format' has been incorporated into the rule. Comments are due by Friday, 8 May 2026.
<b>20 April 2026</b>	Draft amendments to rules under sections 18A, 64D and 120	These amendments affect entry for export by road of specified goods from a customs and excise warehouse and exemptions from the removal of goods by a licensed remover of goods in bond. The due date for comments was Friday, 30 April 2026.
<b>20 April 2026</b>	Increase in diesel refund claims from 80% to 100%	New excise legislation related to diesel refund claims under rebate item 670.04 of Schedule 6 to the Customs and Excise Act, Act No. 91 of 1964, came into effect on 01 April 2026. This legislation increases the allowable diesel consumption percentage for diesel refund claims for on-land primary sector beneficiaries from 80% to 100%. As a result, the eligible litres calculation has been updated in the SARS system and in the SE-DSL-02-Manage Diesel Refund Calculation External policy document.
<b>23 April 2026</b>	Tariff amendments	Publication details for tariff amendments Notice R7389, as published in Government Gazette 54572 of 23 April 2026, have been made available.

## SARS guides and tax directives

20 April 2026

Tax directives and guides

The SARS tax directives system has been enhanced, and the following guides have been updated in line with the legislative changes:

- IT-AE-33-G01 – Tax directive Cease to be Resident and Expiry of Visas – External Guide
- IT-AE-41-G01 – Completion Guide for IRP3(a) and IRP3(s) Forms – External Guide
- IT-AE-41-G02 – Guide to Complete the Lump Sum Tax Directive Application Forms – External Guide
- IT-AE-41-G03 – Guide to Complete, Submit and Cancel a Recognition of Transfer – External Guide
- IT-AE-41-G04 – Guide to the Tax Directive Functionality on eFiling – External Guide

## Rulings

31 March 2026

Binding private rulings

The following binding private rulings were published:

- Binding Private Ruling 427 – Premium paid for right of use
- Binding Private Ruling 426 – Residential accommodation
- Binding Private Ruling 425 – Rehabilitation of mining property

31 March 2026

Binding VAT rulings

The following sanitised VAT rulings were published:

- VAT Ruling 019 – Consideration
- VAT Ruling 018 – Apportionment
- VAT Ruling 017 – VAT treatment of auctioneering artwork for non-residents
- VAT Ruling 016 – Apportionment
- VAT Ruling 015 – Supply of student accommodation

## Case law

### In accordance with the date of judgment

<b>25 March 2026</b>	<i>Trakman NO v CSARS</i> (58927/21) [2026] ZAGPPHC (25 March 2026)	Whether registration as a diesel refund user under section 75 of the Customs and Excise Act 91 of 1964 entitles a taxpayer to claim diesel refunds retrospectively for periods preceding the date of registration.
<b>9 April 2026</b>	<i>Glencore Operations SA (Pty) Ltd and Others v Commissioner for South African Inland Revenue and Another</i> (406 2024) [2026] ZASCA 47 (9 April 2026)	Whether an entity engaged in mining activities qualified, under section 75(1A) of the Customs and Excise Act 91 of 1964 and Note 6(f)(ii)(cc) of rebate item 670.04, as a “person in possession of the necessary authorisation” for purposes of claiming diesel fuel levy refunds, despite not being the formal holder of the mining right. Decision of the High Court confirming the Commissioner’s determination and holding that the taxpayer was not entitled to a refund of the diesel fuel levy for the relevant period reversed on appeal.
<b>16 April 2026</b>	<i>X and Another v CSARS</i> (A117/2025) [2026] ZAWCHC (16 April 2026)	Whether SARS acted lawfully in treating the taxpayer’s objection to an estimated assessment as invalid under Rule 7(2) (b) of the 2023 Tax Court Rules, and whether section 102 of the Tax Administration Act concerning burden of proof was relevant at the objection-validity stage.
<b>20 April 2026</b>	<i>SARSTC VAT 32666 (VAT)</i> [2026] ZATC JHB (18 March 2026)	Whether VAT on service fees, which the taxpayer debited against the accounts of its clients in terms of a banker/client agreement, could be deducted as an input tax in subsequent VAT returns after the service fees were subsequently credited to the accounts of the clients.
<b>22 April 2026</b>	<i>Absa Bank Ltd and Another v CSARS</i> (CCT 72/24) [2026] ZACC 15 (22 April 2026)	Whether the structured transactions entered into by Absa Bank and its subsidiary constituted an “impermissible avoidance arrangement” under sections 80A to 80L of the Income Tax Act 58 of 1962, and whether the applicants derived a “tax benefit” as parties with knowledge of the arrangement.

## Other publications

<b>30 March 2026</b>	ATAF	ATAF has released a guide to support African tax administrations in strengthening the taxation of wealthy individuals and enhance domestic revenue mobilisation across the continent. The <i>Guide to Implementing an Effective High-Net-Worth Individuals Taxation Regime in Africa</i> has been available on the ATAF website.
<b>30 March 2026</b>	ATAF	ATAF and AfDB deepen high-impact partnership on domestic resource mobilisation: As African economies grapple with rising debt burdens, shrinking external aid, and intensifying pressure to fund their own development, two continental institutions are doubling down on a strategy that many now see as unavoidable: financing Africa from within. At the centre of that effort is a deepening partnership between the African Tax Administration Forum (ATAF) and the African Development Bank Group (AfDB). On Thursday, 19 March 2026, ATAF hosted a high-level AfDB delegation led by Director Abdoulaye Coulibaly at its Pretoria headquarters, in a meeting that underscored both the urgency and the growing impact of their collaboration.

<b>30 March 2026</b>	SARS	Following an earlier communication dated 12 December 2025 (reference number 7/6/1/1/2/PQ/DRS/2025/Dec-1), SARS has informed stakeholders that the new diesel refund registration system will open later than initially communicated. Although good progress has been made in developing the modernised system, additional time is required to pilot and test the system to ensure it is stable, secure, and functional.
<b>31 March 2026</b>	ATAF	ATAF advanced Africa's tax policy agenda at the African Union's 5th STC Subcommittee on Tax and Illicit Financial Flows ('IFFs') in Abuja, Nigeria, placing African-designed tax tools and anti-IFF strategies firmly in the spotlight. Led by the Executive Secretary, the ATAF delegation engaged in a packed programme of plenary sessions, bilateral meetings, and technical briefings that will help shape how African countries mobilise revenue and curb illicit flows in the years ahead.
<b>31 March 2026</b>	ATAF and the OECD	The ATAF and the OECD have completed a new series of joint workshops to support advancing transfer pricing simplification across the African region, bringing together more than 130 participants from 17 African countries. Delivered in French, the workshops brought together tax officials from French-speaking African countries alongside experts from ATAF, the OECD, Switzerland, and Zambia.
<b>7 April 2026</b>	SARS	Implementation date of administrative non-compliance penalties for late or non-submission of ITR12T income tax returns for trusts: Following a stakeholder letter issued on 9 February 2026, SARS wishes to update stakeholders on the imposition of non-compliance admin penalties for trusts. Feedback received during the public consultation process indicated that, owing to the complexity of trust tax compliance obligations and the related administration, trustees required additional time to regularise their tax affairs. The Commissioner for SARS approved this request, and an additional two months were approved to enable trustees to regularise these matters.  The imposition of the first admin penalties for tax non-compliance by trusts has been deferred to Monday, 4 May 2026. Accordingly, no admin penalties will be imposed prior to this date.
<b>7 April 2026</b>	SARB	<i>Tax Chronology of South Africa (1979 to 2026)</i> : This publication on the SARB website covers the period 1979 to 2026 and provides an overview of the current and historical rates for various taxes, duties, and levies collected by SARS.
<b>16 April 2026</b>	OECD	<i>OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors</i> : The OECD published the report setting out recent developments in international tax co-operation, including the OECD's support of G20 priorities such as the implementation of the BEPS minimum standards, the global minimum tax framework, and tax transparency. It was prepared by the OECD ahead of the First G20 Finance Ministers and Central Bank Governors' Meeting under the United States G20 Presidency, held on 16 April in Washington, D.C., United States.
<b>17 April 2026</b>	SARB	Draft Capital Flow Management Regulations: National Treasury has published the draft Capital Flow Management Regulations of 2026 for public comment by Monday, 18 May 2026, as conveyed in Government Notice No. 54520 in Government Gazette No. 7375 that was published on 17 April 2026. The draft regulations will replace the Exchange Control Regulations of 1961.

<b>20 April 2026</b>	OECD	<p>The OECD has published the Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors. The report sets out recent developments in international tax co-operation, including the OECD's support of G20 priorities such as the implementation of the BEPS minimum standards, the global minimum tax framework, and tax transparency.</p> <p>It was prepared by the OECD ahead of the First G20 Finance Ministers and Central Bank Governors' Meeting under the United States G20 Presidency, held on 16 April in Washington, D.C., United States.</p>
<b>22 April 2026</b>	OECD	<p><i>Taxing Wages 2026: The Progressivity of Labour Taxation in OECD Countries</i> has been released. This annual publication provides details of taxes paid on wages in OECD countries. This year's edition focuses on the progressivity of the average tax wedge across different earnings intervals and household types. Using data up to 2025, it also examines personal income taxes and social security contributions paid by employees, social security contributions and payroll taxes paid by employers, and cash benefits received by workers.</p>
<b>22 April 2026</b>	SARS	<p>Simplified Beneficial Owner Register for Partnerships: SARS is launching a single eFiling form, the Beneficial Owner Register IT3(BO). A designated partnership representative must use this form annually to register, fill out, and submit all partners' information for the partnership. As a result, individual partners will no longer need to enter all partner details on the ITR12.</p> <p>Once the partnership representative submits the Partnership IT3(BO), SARS will issue an IT3(BO) unique number after processing the IT3(BO) form. Partners can use only this IT3(BO) unique number to declare partnership details on the ITR12. More information is available on the SARS website.</p>
<b>22 April 2026</b>	SARB	<p>Tax white paper and key updates supporting the Jibar transition: The Market Practitioners Group ('MPG') has published a white paper on the tax implications of the Jibar transition. This paper is intended to help market participants evaluate the potential tax consequences that may arise from various methods of transitioning Jibar-linked contracts to ZARONIA. As previously announced by the SARB, Jibar will be discontinued on 31 December 2026. The SARB and MPG have identified ZARONIA as the preferred reference rate to replace Jibar.</p> <p>Importantly, the MPG plans to use the white paper as a basis for discussions with relevant authorities regarding the possibility of issuing formal tax guidance. Market participants are thus invited to submit comments on the white paper to the MPG Secretariat (MPGSecretariat@resbank.co.za) by Thursday, 21 May 2026.</p>



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